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12 UNITED STATES DISTRICT COURT
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14 NORTHERN DISTRICT OF CALIFORNIA
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16 SAN JOSE DIVISION
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12 DEBORAH DI GRAZIA,
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14 Plaintiff,
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16 v.
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18 SAZERAC COMPANY, INC.,
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20 Defendant.
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Case No. 5:08-CV-01562-JW

**DEFENDANT SAZERAC COMPANY, INC.'S
NOTICE OF MOTION AND MOTION TO
DISMISS COMPLAINT FOR FAILURE TO
STATE A CLAIM; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF**

Ctrm: 8
Judge: Hon. James Ware
Date: May 5, 2008
Time: 9:00 am

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1 **NOTICE OF MOTION AND MOTION TO DISMISS**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THIS MATTER:

3 PLEASE TAKE NOTICE that on Monday, May 5, at 9:00 a.m., or as soon thereafter as
4 this motion may be heard, defendant Sazerac Company, Inc. (“Sazerac”) will move to dismiss
5 with prejudice the claims set forth in plaintiff Deborah di Grazia’s complaint. This motion is
6 made under Federal Rule of Civil Procedure 12(b)(6).

7 Sazerac moves to dismiss with prejudice the first through fifth causes of action on the
8 ground that the complaint fails to state any claim upon which relief may be granted. This motion
9 is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and
10 Authorities, the pleadings on file, oral argument of counsel, and such other materials and
11 argument as may be presented in connection with the hearing on the motion.

12 **STATEMENT OF THE ISSUE**

13 Under a royalty agreement between Sazerac and plaintiff’s deceased husband, does
14 Sazerac have a continuing duty to make payments to plaintiff where: (a) the royalty agreement
15 specifically conditions such payments on Sazerac’s purchases of product from a third party under
16 a separate distribution agreement; (b) that third-party distribution agreement has ended; and (c)
17 Sazerac is no longer making any purchases under the distribution agreement?

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. INTRODUCTION**

20 This is a straightforward dispute involving the plain language of a royalty agreement
21 between Sazerac and Loris di Grazia, plaintiff’s deceased husband (the “Royalty Agreement”).¹
22 As explained in detail below, the Royalty Agreement was entered in 1991 and guaranteed certain
23 sums to Mr. di Grazia in exchange for Mr. di Grazia transferring to Sazerac the exclusive right to
24 import and distribute tequila manufactured in Mexico by Tequila Herradura, S.A., de C.V.
25 (“Herradura”).² Over the first seven years of the Royalty Agreement, Mr. di Grazia was
26 *guaranteed* an initial payment of \$500,000 and further payments of \$2 million provided the

27 ¹ The Royalty Agreement is attached to plaintiff’s complaint as Exhibit B.

28 ² The distribution agreement between Herradura and Sazerac is attached to plaintiff’s complaint
as Exhibit A (the “Distribution Agreement”).

1 Distribution Agreement remained in force. Royalty Agreement, ¶2(a). Plaintiff does not allege
2 any breach concerning these guaranteed payments.

3 After Mr. di Grazia received the \$2.5 million in guaranteed payments, the Royalty
4 Agreement provided for further commission payments based exclusively on Sazerac's *purchases*
5 of tequila from Herradura under the Distribution Agreement. *Id.* As the complaint concedes,
6 Sazerac continued to pay Mr. di Grazia and plaintiff for as long as Sazerac was purchasing tequila
7 from Herradura. Compl. ¶17. The complaint further acknowledges that in 2006 Sazerac gave up
8 its right to distribute Herradura tequila in the United States, *id.* at ¶19, and thereafter stopped
9 making payments to plaintiff because Sazerac "was no longer making purchases of Herradura
10 Brands." *Id.* at ¶20.

11 As discussed below, the Royalty Agreement is clear on its face and repeatedly conditions
12 all payments beyond the initial guarantee on "purchases" of tequila by Sazerac from Herradura.
13 The Royalty Agreement is straightforward and logical – it guarantees a lucrative minimum
14 payment to Mr. di Grazia in exchange for relinquishment of his rights but then conditions future
15 payments on Sazerac's *purchases* of tequila from Herradura. The requirement of a commercial
16 transaction as a condition of Sazerac's obligation is underscored in paragraph 2(a)(v) of the
17 Royalty Agreement, which specifically defines the term "purchases" as "deemed to have occurred
18 when ownership of the Brands has transferred from Herradura to Sazerac at the F.O.B. point"
19 The complaint nowhere alleges that Sazerac has continued to purchase tequila from Herradura
20 under the Distribution Agreement while at the same time declining to pay royalties to plaintiff.

21 The Royalty Agreement shows that these sophisticated parties negotiated for certain
22 guaranteed payments to Mr. di Grazia during the early years of the Distribution Agreement.
23 Royalty Agreement, ¶2(a)(i)-(ii). The parties also included in the Royalty Agreement a provision
24 covering what Mr. di Grazia would be paid if the Distribution Agreement were terminated prior
25 to December 31, 1998. *Id.* at ¶2(a)(ii). Had the parties chosen to do so, they could just as easily
26 have included additional language in the Royalty Agreement providing for a termination payment
27 by Sazerac to Mr. di Grazia in the event Sazerac's rights under the Distribution Agreement were
28 terminated, voluntarily or involuntarily, *after* December 31, 1998, or *after* satisfaction of the

1 initial guaranteed payments. The parties chose not to include such language and chose not to
 2 guarantee any further payments to Mr. di Grazia after the initial guarantees were satisfied. This
 3 choice should end the inquiry. “The court does not have the power to create for the parties a
 4 contract which they did not make, and it cannot insert in the contract language which one of the
 5 parties now wishes were there.” *Levi Strauss & Co. v. Aetna Casualty and Surety Co.*, 184 Cal.
 6 App. 3d 1479, 1486 (1986).

7 Plaintiff asserts five causes of action: (1) breach of the Royalty Agreement; (2) breach of
 8 the implied covenant of good faith and fair dealing; (3) unjust enrichment; (4) breach of an
 9 implied covenant to continue purchasing Herradura brands; and (5) breach of plaintiff’s rights as
 10 a third-party beneficiary of the Distribution Agreement. Whatever label plaintiff attaches to her
 11 claims, however, each is fundamentally dependent on the existence of an obligation owed to
 12 plaintiff by Sazerac and arising from either the Royalty Agreement or the Distribution
 13 Agreement. The complaint fails on both fronts.

14 First, because the Royalty Agreement expressly conditions Sazerac’s payment obligation
 15 on Sazerac’s “purchases” of Herradura tequila, and because plaintiff does not allege that Sazerac
 16 is continuing to make such purchases, all of her claims under the Royalty Agreement must fail.
 17 Second, because plaintiff is a stranger to the Distribution Agreement, and because plaintiff cannot
 18 allege that the Distribution Agreement was actually breached by Sazerac, her implied third-party
 19 claims under that contract must also fail. Accordingly, the complaint should be dismissed with
 20 prejudice.

21 **II. STATEMENT OF RELEVANT FACTS**

22 The Distribution Agreement was entered by Herradura and Sazerac on October 21, 1991,
 23 and appointed Sazerac the exclusive United States importer and distributor of Herradura tequila
 24 brands. The initial term of the Distribution Agreement was 20 years. Distribution Agreement,
 25 ¶5. However, Herradura reserved the right to terminate the Distribution Agreement if Sazerac did
 26 not achieve certain growth metrics for the brands, *id.* at ¶15, or breached the Distribution
 27 Agreement, *id.* ¶21(a)(i), or failed to meet certain licensure and financial conditions, *id.* at
 28 ¶21(a)(ii)-(v).

1 The Royalty Agreement was entered by Sazerac and Mr. di Grazia on October 21, 1999.
 2 Under the Royalty Agreement, Mr. di Grazia agreed to relinquish his rights as “the exclusive
 3 representative” in the United States for Herradura tequila. Royalty Agreement, p. 1. In
 4 exchange, Sazerac agreed to pay Mr. di Grazia “an initial payment upon the effective date of the
 5 [Distribution] Agreement” and “subsequent payments *based upon purchases* of the Brands by
 6 Sazerac.” *Id.* at ¶1(b)(ii) (emphasis added). These payments were further defined as follows:

- 7 • An upfront payment of \$500,000 (\$25 per nine liter case for the first 20,000
 8 cases of Herradura tequila that were then in inventory in the United States). *Id.*
 9 at ¶2(a)(i).
- 10 • After the upfront payment, Sazerac agreed to pay di Grazia \$14 per nine liter
 11 case purchased by Sazerac from Herradura until a total of \$2,000,000 was paid
 12 to di Grazia. “If by December 31, 1998, Sazerac has not made to di Grazia
 13 payments totaling \$2,000,000, Sazerac will pay to di Grazia, on that date, an
 14 amount equal to the difference between actual payments made and
 15 \$2,000,000.” *Id.* at ¶2(a)(ii).
- 16 • “Notwithstanding anything to the contrary in this paragraph 2(a)(ii), if the
 17 [Distribution] Agreement is terminated prior to December 31, 1998, Sazerac is
 18 obligated to pay to di Grazia only the amount of payments that accrued through
 19 the date of termination.” *Id.*
- 20 • After Mr. di Grazia was paid the \$2,000,000 guarantee (provided the
 21 Distribution Agreement was not terminated before December 31, 1998),
 22 Sazerac agreed to pay him \$6 per nine liter case “on the *purchases* of the
 23 brands by Sazerac” until the expiration of the initial term of the Distribution
 24 Agreement. *Id.* at ¶2(a)(iii) (emphasis added).

25 * * * *

26 Because the Royalty Agreement specifically conditions payment to di Grazia on purchases
 27 by Sazerac, the latter term is expressly defined in the Royalty Agreement. “[P]urchases by
 28 Sazerac from Herradura shall be deemed to have occurred when ownership of the Brands has

1 transferred from Herradura to Sazerac at the F.O.B. point, as provided in the [Distribution]
2 Agreement.” *Id.* at ¶2(a)(v).

3 As the complaint acknowledges, “[f]or approximately 15 years, Sazerac *made purchases*
4 of Herradura Brands, and it made regular payments to Mr. di Grazia *based on those purchases.*”
5 Compl., ¶17 (emphasis added). In early 2006, Mr. di Grazia passed away. *Id.* at ¶18. Thereafter,
6 Sazerac continued to purchase Herradura tequila and continued to pay corresponding royalties to
7 plaintiff (Mr. di Grazia’s widow). *Id.* Later that year, however, Herradura was acquired by
8 another company (Brown-Forman Corp.) and Sazerac “voluntarily gave up its rights to distribute
9 the Herradura Brands in the United States.” *Id.* at ¶19. The complaint does not (and cannot)
10 allege that Sazerac made “purchases” under the Distribution Agreement after this time. Sazerac
11 informed plaintiff that it would not make further payments under the Royalty Agreement because
12 it “was no longer making purchases of Herradura Brands.” *Id.* at ¶20.

13 Plaintiff filed her complaint in the California Superior Court for Monterey County on
14 February 20, 2008. Sazerac was served through its registered agent for process in California on
15 February 21, 2008. On March 21, 2008, Sazerac removed the action based on the diversity
16 jurisdiction of this Court.³

17 **III. LEGAL STANDARDS UNDER RULE 12(b)(6)**

18 Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal of a claim when
19 “there is no cognizable legal theory or an absence of sufficient facts alleged to support a
20 cognizable legal theory.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Federal courts
21 “do not require heightened fact pleading of specifics, but only enough facts to state a claim to
22 relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).
23 In deciding a motion under Rule 12(b)(6), “all material allegations of the complaint are accepted
24 as true, as well as all reasonable inferences to be drawn from them.” *Navarro*, 250 F.3d at 732
25 (citing *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996)). However, “labels and
26 conclusions, and a formulaic recitation of the elements of a cause of action will not” survive a

27 _____
28 ³ Plaintiff is a resident of California. Compl., ¶7. Sazerac is incorporated in and has its principal
place of business in Louisiana. *Id.* at ¶8.

1 motion to dismiss. *Twombly*, 127 S.Ct. at 1965-66. *Accord Nat'l Ass'n for Advancement of*
 2 *Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1049 (9th Cir. 2000) ("Conclusory
 3 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for
 4 failure to state a claim.").

5 In considering a motion to dismiss under Rule 12(b)(6), a federal district court sitting in
 6 diversity applies state substantive law and federal procedural rules. *See Erie R. Co. v. Tomkins*,
 7 304 U.S. 64, 78 (1938). In determining which state law applies, the federal court applies the
 8 choice of law principles of the state in which it sits. *Arno v. Club Med., Inc.*, 22 F.3d 1464, 1467
 9 (9th Cir. 1984). Under California choice of law principles, where a contract designates the law to
 10 apply to disputes, the court must apply that state's law unless (1) the chosen state has no
 11 substantial relationship to the parties or transaction; or (2) such application would run contrary to
 12 a California public policy or evade a California statute. *Gen. Signal Corp. v. MCI Telecomms.*
 13 *Corp.*, 66 F.3d 12500, 1506 (9th Cir. 1995).

14 In this case, the Royalty Agreement provides that it "shall be construed and interpreted in
 15 accordance with the laws of the state of California..." Royalty Agreement, ¶5. Plaintiff resides
 16 in California, and all payments from Sazerac were directed to California. There is no California
 17 policy or statute that requires application of another state's law. Therefore, whether plaintiff has
 18 stated any cognizable legal claim should be determined under California law.

19 Finally, both the Royalty Agreement and the Distribution Agreement are attached to the
 20 complaint. *See supra* notes 1 & 2. Where the terms set forth in a written contract attached to a
 21 complaint do not support plaintiff's allegations of breach of contract, the terms of the written
 22 contract control. *See Wyler Summit Partnership v. Turner Broadcasting Sys., Inc.*, 135 F.3d 658,
 23 665 (9th Cir. 1998) (where contract attached to complaint, "neither we nor the district court are
 24 required to accept as true conclusory allegations in the complaint which are contradicted by the
 25 clear import of the contract itself."); *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.
 26 1987) ("If a complaint is accompanied by attached documents, the court is not limited by the
 27 allegations contained in the complaint. These documents are part of the complaint and may be
 28 considered in determining whether the plaintiff can prove any set of facts in support of the claim."

(internal citations omitted); *Fundin v. Chicago Pneumatic Tool*, 152 Cal. App. 3d 951, 955-56 (1984) (sustaining demurrer to breach of contract claim based in part on terms of contract attached to complaint).

IV. ARGUMENT

A. Plaintiff's First, Second, and Third Causes of Action Fail Because Sazerac Has No General Duty To Pay Plaintiff

The Royalty Agreement obligated Sazerac to pay Mr. di Grazia a royalty that was expressly conditioned on Sazerac's "purchases" of Herradura tequila under the Distribution Agreement. Royalty Agreement, ¶2(a). Despite this plain language, plaintiff's first three causes of action all depend upon the conclusory allegation that Sazerac has a duty to pay royalties to plaintiff *in the absence of* such purchases. Although plaintiff attaches different labels to these causes of action, the fundamental allegation is the same:

- "Sazerac breached the Agreement by failing to pay Mrs. di Grazia when Sazerac received payments in lieu of purchases..." Compl. ¶23.
- "Sazerac breached the covenant of good faith and fair dealing by ... receiving compensation ... without paying Mrs. di Grazia..." Compl. ¶28.
- "By failing to pay the appropriate portion of this amount to Mrs. di Grazia ... Sazerac has been unjustly enriched..." Compl. ¶31.

* * * * *

Simply alleging that the defendant "breached the agreement" or "has been unjustly enriched" is not sufficient to state a cause of action where the language of the contract is attached to the complaint and contradicts those allegations. In the Ninth Circuit, courts "are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint," and "do not ... necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (internal citations omitted). Here, the Royalty Agreement specifically and repeatedly conditions Sazerac's obligation to make royalty payments on Sazerac's "purchases" of Herradura products. Royalty Agreement, ¶1(b)(ii)(B), ¶2(a). Because the

complaint itself concedes that Sazerac is no longer a party to the Distribution Agreement and is therefore no longer making the requisite purchases from Herradura, Sazerac is under no obligation to make further royalty payments. No amount of careful pleading can create an obligation that does not exist under the plain terms of the contract.

1. Plaintiff Cannot State a Claim for Breach of Contract

Plaintiff's first cause of action alleges breach of contract. Plaintiff alleges that Sazerac breached the Royalty Agreement by failing to pay her when Sazerac received payments from either Brown-Forman or Herradura "in lieu of purchases Sazerac would otherwise have made during the remaining term of the Herradura-Sazerac Agreement." Compl. ¶23. Notably, plaintiff is silent concerning where one might look in the Royalty Agreement for the "in lieu of purchases" clause that plaintiff now seeks to invent 17 years after the contract was negotiated by Mr. di Grazia and Sazerac.

In order to state a claim for breach of contract, a plaintiff must allege that: (1) there was a contract between the parties (or an assignment of rights under a contract); (2) the plaintiff did all that she was required to do under the contract; (3) all conditions required for the defendant's performance occurred; (4) the defendant failed to do something required by the contract; and (5) the plaintiff was damaged in some way by that failure. *See* California Forms of Jury Instruction, CACI 303.

Plaintiff has failed to allege sufficient facts to meet her pleading burden on the fourth element.⁴ Specifically, plaintiff does not and cannot claim that the express condition required for Sazerac's performance – "purchases" of Herradura products by Sazerac – took place as required by the Royalty Agreement. *See Consol. World Invests., Inc. v. Lido Preferred Ltd.*, 9 Cal. App. 4th 373, 380 (1992) (where defendant's duty to perform is conditioned on an event, plaintiff must plead and prove that the event transpired). The bare allegation that Sazerac is liable when it failed to pay plaintiff after it received payments "in lieu of purchases," Compl. ¶ 23, is

⁴ At this stage of the proceeding, Sazerac does not dispute that there was a contract, that plaintiff is a valid assignee, that she fulfilled her obligations, and that she was damaged in some way. Sazerac accepts these allegations as true only as required at the pleading stage and reserves the right to challenge these claims at a later date.

1 unsupported and unsupportable because the Royalty Agreement provides for no such thing. *See*
 2 *Wylar Summit Partnership*, 135 F.3d at 665 (holding that “neither we nor the district court are
 3 required to accept as true conclusory allegations in the complaint which are contradicted by the
 4 clear import of the contract itself”).

5 The Royalty Agreement is plain on its face and neither party should now be permitted to
 6 rewrite its terms through extrinsic evidence or interpretive guesswork. *See Founding Members v.*
 7 *Newport Beach Country Club*, 109 Cal. App. 4th 944, 955 (2003) (when a contract is clear on its
 8 face, extrinsic evidence is not admissible and the plain meaning controls); *National City Police*
 9 *Officers’ Assn. v. City of National City*, 87 Cal. App. 4th 1274, 1279 (2001) (holding that
 10 “language of an instrument must govern its interpretation if the language is clear and explicit”).
 11 The Royalty Agreement specifically provides that all commission payments following an initial
 12 payment will be “based upon purchases of the Brands by Sazerac.” Royalty Agreement,
 13 ¶1(b)(ii)(B); *see also* ¶2(a)(ii)-(iv). The parties specifically negotiated this condition, going so far
 14 as to include a separate definitional paragraph specifying that a purchase “shall be deemed to
 15 have occurred **when ownership of the Brands has transferred from Herradura to Sazerac at the**
 16 **F.O.B. point**, as provided in the Definitive Agreement.” *Id.* at ¶2(v) (emphasis added). It is an
 17 indisputable condition precedent to Sazerac’s payment obligation that ownership of the products
 18 transfer to Sazerac. Plaintiff does not even attempt to allege that this condition has been met.

19 Critically, the Royalty Agreement also reveals that the parties negotiated and agreed to
 20 alternative payment mechanisms in certain situations that were not dependent on Sazerac’s
 21 purchases. For example, the parties agreed that Mr. di Grazia would receive an upfront \$500,000
 22 payment based on the inventory of Herradura tequila then being stored in the United States. *Id.* at
 23 ¶2(a)(1). The parties also agreed that Sazerac would guarantee \$2 million in royalty payments to
 24 Mr. di Grazia as of December 31, 1998, even if Sazerac’s purchases as of that date did not warrant
 25 royalties in that amount (provided the Distribution Agreement was still in effect). *Id.* at ¶2(a)(ii).

26 After that date, however, **and after payment of the \$2.5 million guarantee**, the parties
 27 expressly conditioned further payments on Sazerac’s purchases of Herradura products. That these
 28 sophisticated parties agreed to an alternative payment mechanism in some situations but not in

others indicates that they knew how to negotiate such an alternative but chose not to do so.⁵ It is equally true that Mr. di Grazia was fully capable of seeking a guaranteed termination payment from Sazerac in the event the Distribution Agreement ended for any reason after December 31, 1998. He chose not to do so and it would be manifestly unfair to permit plaintiff to rewrite the Royalty Agreement today. Courts will neither “insert in the contract language which one of the parties now wishes were there” nor “add a term about which a contract is silent.” *Levi Strauss*, 184 Cal. App. 3d at 1486. *See also Heppler v. J.M. Peters Co.*, 73 Cal. App. 4th 1265, 1291 (1999) (declining to enforce alleged term of agreement because parties “could have included such a provision” had that been their intent).

Sazerac either made “purchases” from Herradura or it did not. If the former, Sazerac may owe royalties to the plaintiff; if the latter, Sazerac owes nothing to plaintiff. The parties negotiated the Royalty Agreement in this straightforward fashion and the “courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably.” *Walnut Creek Pipe Dist. v. Gates Rubber Co. Sales Div.*, 228 Cal. App. 2d 810, 815 (1964).

2. Plaintiff Cannot State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiff next alleges a breach of the covenant of good faith and fair dealing. Plaintiff asserts that Sazerac breached the covenant “by voluntarily relinquishing its rights to distribute the Herradura Brands and receiving compensation therefore without paying Mrs. di Grazia in accordance with the [Royalty] Agreement.”

In order to establish a breach of the implied covenant of good faith and fair dealing, the plaintiff must adequately plead four elements: (1) there was a contract; (2) she did all that was required of her; (3) the conditions for Sazerac’s performance occurred; and (4) Sazerac “unfairly interfered with her right to receive the benefits of the contract.” *See California Forms of Jury Instruction, CACI 325*. The covenant does not create a fiduciary relationship. *Wolf v. Super. Ct.*

⁵ Mr. di Grazia was a sophisticated businessman who held the United States rights to Herradura for over 25 years and had previously negotiated similar agreements with Seagram’s and other entities. *See* Compl. ¶2; Royalty Agreement, p. 1.

1 107 Cal. App. 4th 25, 31 (2003). Moreover, implied terms in a contract will never be read to vary
2 express terms. *Carma Developers Inc. v. Marathon Development Cal. Inc.*, 2 Cal. 4th 342, 374
3 (1992). The implied covenant of good faith and fair dealing can only be breached by objectively
4 unreasonable conduct. *See Badie v. Bank of America*, 67 Cal. App. 4th 779, 796 (1998) (bank
5 breached covenant by altering contract to require ADR and sending inadequate notice to account
6 holders).

7 As discussed above, the condition triggering Sazerac's performance obligation did not
8 occur. Plaintiff may not substitute implied terms in order to vary the express terms of the Royalty
9 Agreement. *Carma Developers*, 2 Cal. 4th at 374. Accordingly, this claim fails for the reasons
10 set forth above.

11 Plaintiff's second cause of action fails for an additional reason. Plaintiff alleges, in
12 essence, that Sazerac had a duty to continue purchasing Herradura product through (at least) the
13 end of the initial term. Compl. ¶28. The complaint alleges that Sazerac voluntarily relinquished
14 that duty (and its rights under the Distribution Agreement), thereby causing a breach of the
15 covenant of good faith and fair dealing. This theory directly contradicts California law. *See*
16 *Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal. App. 2d 141, 149 (1941) (where substantial
17 minimum payment made by obligor, the covenant of good faith and fair dealing will not impose
18 additional duty to stay in business); *College Block v. Atlantic Richfield Co.*, 206 Cal. App. 3d
19 1376, 1381-82 (1988) (applying same analysis).

20 On the face of the complaint, this is **not** a case in which Sazerac abandoned its obligations
21 to Mr. di Grazia and left him without any return on any pre-1991 investment he made in the
22 Herradura brands. To the contrary, the complaint essentially concedes that Mr. di Grazia was
23 paid the \$2.5 million guarantee as of December 31, 1998, and received "regular payments"
24 thereafter based on Sazerac's "purchases of Herradura Brands." Compl. ¶17. The parties
25 negotiated the Royalty Agreement at arms length and agreed not to include an additional payment
26 guarantee after December 31, 1998, **and** after Mr. di Grazia was paid \$2.5 million. The covenant
27 of good faith and fair dealing will not permit plaintiff to re-draft the Royalty Agreement to her
28 liking 17 years after it was signed.

3. Plaintiff Cannot State a Claim for Unjust Enrichment

Plaintiffs' claim for "unjust enrichment" is barred because "there is no cause of action in California for unjust enrichment." *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003). In the absence of a cognizable legal ground on which plaintiff may proceed, this cause of action should be dismissed. *See Navarro*, 250 F.3d at 732. Even if such a cause of action exists, plaintiff's claim still fails because the complaint does not allege what is "unjust" about Sazerac receiving payment "in exchange for voluntarily giving up rights to distribute Herradura brands in the United States." Compl. ¶31. Had Sazerac continued making purchases of Herradura products and declined to pay Mr. di Grazia, one could plausibly argue that Sazerac would be unjustly enriched. There is no such allegation here, nor could there be, and plaintiff's claim must fail.

Whether something is "unjust" is determined by the courts on a case-by-case basis. *See Kossian v. American Nat. Ins. Co.*, 254 Cal. App. 2d 647, 650 (1967). Generally, an unjust enrichment claim is only appropriate where a party obtains a benefit that it may not justly retain. *See Lectrodryer v. SeoulBank* 77 Cal. App. 4th 723, 726 (2000) (bank unjustly enriched when it refused to honor prepaid letter of credit and retained funds after letter expired). Here, plaintiff's claim rests on the proposition, directly contradicted by the Royalty Agreement, that Sazerac has some duty to pay plaintiff additional sums beyond the multi-million dollar guarantee and despite having made no purchases of Herradura products. For the reasons stated above, this claim cannot withstand scrutiny under either the Royalty Agreement, the Distribution Agreement, or California law. Sazerac's motion to dismiss the third cause of action should be granted.

4. Plaintiff Cannot State a Claim for Breach of an Implied Covenant to Continue Purchasing Herradura Brands

In her fourth cause of action, plaintiff again pursues a legal theory that is directly contradicted by the plain terms of the Royalty Agreement. The complaint alleges that the Royalty Agreement contained an additional implied covenant that Sazerac "would continue to make purchases of Herradura Brands during the full term of the Herradura-Sazerac Agreement." Compl. ¶34. The complaint concedes, as it must, that the parties chose not "to expressly state the covenant" anywhere in the Royalty Agreement. Despite plaintiff's artful pleading, this cause of

1 action must fail because California law does not recognize “implied covenants” that would alter
 2 the negotiated and express terms of an agreement. *Carma Developers*, 2 Cal. 4th at 374. It bears
 3 emphasis that Mr. di Grazia certainly could have negotiated for the very covenants now sought by
 4 the plaintiff. The parties ultimately did not agree to such additional terms. No amount of legal
 5 theorizing can re-write the Royalty Agreement to include guarantees and payment triggers that
 6 were never agreed to by Sazerac.

7 Implied covenants are strongly disfavored in California. “The law refuses to read into
 8 contracts anything by way of implication except upon grounds of obvious necessity.” *Walnut*
 9 *Creek*, 228 Cal. App. 2d at 815. A court will only read an implied covenant into a contract when
 10 five related elements are present:

11 (1) the implication must arise from the language used or it must be
 12 indispensable to effectuate the intention of the parties; (2) it must
 13 appear from the language used that it was so clearly within the
 14 contemplation of the parties that they deemed it unnecessary to
 15 express it; (3) implied covenants can only be justified on the
 grounds of legal necessity; (4) a promise can be implied only where
 it can be rightfully assumed that it would have been made if
 attention had been called to it; (5) there can be no implied covenant
 where the subject is completely covered by the contract.

16 *Cousins*, 45 Cal. App. 2d at 149.

17 Although the complaint attempts to plead these elements, the effort is undone by the plain
 18 language of the Royalty Agreement. As discussed above, courts “are not required to accept as
 19 true conclusory allegations which are contradicted by documents referred to in the complaint.”
 20 *Warren*, 328 F.3d at 1139. Nor should courts at the pleading stage “necessarily assume the truth
 21 of legal conclusions merely because they are cast in the form of factual allegations.” *Id.*

22 Most significantly, plaintiff cannot plead facts to support the claim that the allegedly
 23 implied term is “indispensable” to effectuate the intent of the parties when other provisions of the
 24 contract directly undermine the implied term. The Royalty Agreement sets forth different
 25 payment mechanisms for different time periods: an initial payment, a guaranteed payment of
 26 \$2,000,000, and last, payment as long as Sazerac continues to purchase products from Herradura.
 27 These clear provisions undermine plaintiff’s claim that the newly implied term – a guaranteed
 28 payment in the absence of purchases by Sazerac – is indispensable to effectuate the intent of the

1 parties and was so clearly contemplated by the parties that they deemed it unnecessary to express
 2 it. Mr. di Grazia could have negotiated for such a term and the parties could have agreed to it.
 3 They did not do so and there is no basis upon which to imply it now. *See Walnut Creek*, 228 Cal.
 4 App. 2d at 815 (holding that “courts cannot make better agreements for parties than they
 5 themselves have been satisfied to enter into or rewrite contracts because they operate harshly or
 6 inequitably”). Therefore, Mrs. di Grazia’s implied covenant claim must be dismissed.

7 **5. Plaintiff Cannot State a Claim for Third-Party Beneficiary Rights**

8 Plaintiff’s final cause of action alleges that she is a third-party beneficiary of the
 9 Distribution Agreement between Herradura and Sazerac. Section 1559 of the California Civil
 10 Code provides that “a contract, made expressly for the benefit of a third person, may be enforced
 11 by him at any time before the parties thereto rescind it.” Cal. Civ. Code § 1559. As a threshold
 12 matter, this claim must fail because plaintiff cannot establish that she was an intended beneficiary
 13 of the Distribution Agreement.

14 In order to recover as a third-party beneficiary, a plaintiff must plead that the subject
 15 contract was made expressly for her benefit and that it clearly appears in the contract that she was
 16 an intended beneficiary. Cal. Civ. Code § 1559; *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 936, 943
 17 (1976); *Perrine v. Pacific Gas & Elec. Co.*, 186 Cal. App. 2d 442, 446-47 (1960). The plaintiff
 18 bears the burden of pleading and proving that the parties to the contract intended for her to benefit
 19 from it. *Loduca v. Polyzos*, 153 Cal. App. 4th 334, 341 (2007); *Garcia v. Truck Ins. Exchange*,
 20 36 Cal. 3d 426, 436-37 (1984).

21 Under this authority, plaintiff must plead that the parties intended for her to be the third-
 22 party beneficiary of the Distribution Agreement. *See Road Sprinkler Fitters Local Union No. 669*
 23 *v. G&G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765, 775 n.14 (2002) (union, as assignee of third-
 24 party beneficiary, had to establish its standing as third-party beneficiary). Although plaintiff has
 25 alleged that her husband was a third-party beneficiary of the Distribution Agreement, she has not
 26 pled any facts to support equivalent status in her own right. In addition, the Distribution
 27 Agreement nowhere indicates that the parties intended to **directly** benefit plaintiff. At most, she is
 28 an incidental beneficiary and is therefore precluded from bringing a claim to enforce the

1 Distribution Agreement. Cal. Civ. Code § 1559; *Martinez v. Socoma Cos., Inc.*, 11 Cal. 3d 394,
 2 400 (1974); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal. App. 4th 1020, 1039-1040
 3 (2003).

4 Plaintiff's third-party claim fails for a second reason. There is no separate right of a third
 5 party to receive benefits from a contract *independently* of that contract. Instead, the right of a
 6 third party beneficiary is to enforce the underlying contract in the event of a breach of that
 7 contract. *See Gulf Ins. Co. v. Hi-Voltage Wire Words, Inc.*, 388 F.Supp.2d 1134, 1336-37 (E.D.
 8 Cal. 2005). Like a party to a contract, a third-party beneficiary must show: (1) the existence of a
 9 contract; (2) performance or excuse for nonperformance; (3) breach; and (4) damages. *See id.*;
 10 *San Diego Housing Comm'n v. Industrial Indem. Co.*, 95 Cal. App. 4th 669, 685 (2002) ("a
 11 claimant may sue ... as a third party beneficiary utilizing traditional contract principles, when the
 12 duties under the policy flow directly in favor of the third party... These rights are grounded in
 13 Civil Code section 1559.").

14 Here, plaintiff does not allege that Sazerac breached the Distribution Agreement in any
 15 way. *See* Compl. ¶¶37-42. In fact, she cannot make such a claim in good faith because, as she
 16 alleges elsewhere, Sazerac exited the Distribution Agreement "voluntarily" and in exchange for a
 17 monetary payment from Herradura or the brand's new owner (Brown-Forman Corp.). *Id.* ¶19.
 18 Third party beneficiary or not, plaintiff cannot complain of a breach that did not happen. The
 19 Court should therefore grant Sazerac's motion to dismiss the fifth and final cause of action.

20 V. CONCLUSION

21 For each of these reasons, Sazerac respectfully requests that this Court dismiss with
 22 prejudice, and without leave to amend, each cause of action asserted in plaintiff's complaint.

23 Dated: March 28, 2008

Respectfully submitted,

24 COOLEY GODWARD KRONISH LLP

25
 26 /s/
 27 Michael A. Attanasio

28 Attorneys for Defendant
 SAZERAC COMPANY, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DEBORAH DI GRAZIA,

Plaintiff,

v.

SAZERAC COMPANY, INC.,

Defendant.

Case No. 5:08-CV-01562-JW

**[PROPOSED] ORDER GRANTING
SAZERAC COMPANY, INC.'S MOTION TO
DISMISS COMPLAINT PURSUANT TO FED.
R. CIV. PROC. 12(b)(6)**

Ctrm: 8
Judge: Hon. James Ware
Date: May 5, 2008
Time: 9:00 am

THIS MATTER, having come before the Court on Defendant Sazerac Company, Inc.'s Motion to Dismiss Complaint Pursuant to Fed. R. Civ. Proc. 12(b)(6), filed March 28, 2008, and the Court having considered all papers and pleadings submitted by the parties, and the oral arguments of counsel made at the hearing,

IT IS HEREBY ORDERED that Sazerac Company, Inc.'s motion to dismiss shall be **GRANTED** as to each cause of action and Plaintiff's Complaint shall be **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

Dated: _____, 2008

The Honorable James Ware
United States District Judge

PROOF OF SERVICE
(FRCP 5)

I am a citizen of the United States and a resident of the State of California. I am employed in San Diego County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley Godward Kronish LLP, 4401 Eastgate Mall, San Diego, California 92121. On the date set forth below I served the documents described below in the manner described below:

1. Defendant Sazerac Company, Inc.'s Notice of Motion and Motion to Dismiss Complaint for Failure to State a Claim; Memorandum of Points and Authorities in Support Thereof
2. [Proposed] Order Granting Sazerac Company, Inc.'s Motion to Dismiss Complaint Pursuant to Fed.R. Civ. Proc. 12(b) (6)

on the following part(ies) in this action:



(BY ELECTRONIC MAIL) I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail to the parties listed below.

Andrew A. Bassak abassak@manatt.com
 Ann M. Heimberger aheimberger@manatt.com



(BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

Ross K. Naughton
 Manatt, Phelps & Phillips, LLP
 One Embarcadero Center, 30th Floor
 San Francisco, CA 94111

Executed on March 28, 2008, at San Diego, California.

/s/ _____
 Jacqueline J. Foglio